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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

DAVID BUNCH, Petitioner

v.

JAMES LOGAN HELM, ADMINISTRATOR OF THE ESTATE OF LARRY HELM (FORMERLY LARRY HELM), Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOSEPH G. GLASS
235 South 5th Street
Louisville, Kentucky
40202
(502) 584-7288

Counsel for Petitioner

10500

QUESTIONS PRESENTED

1. Was it error for the District Court Judge to answer jurors' questions about attorneys' fees and costs in a civil rights suit brought under 42 U.S.C. § 1983?

2. Was it error for the District Court Judge, when presented with an affidavit of a juror, to decline to hold an evidentiary hearing, after verdict, upon the issue of bias of the jury Foreman?

LIST OF PARTIES

The parties to the proceedings below were the petitioner David Bunch; Roger Pierce; and James Dunbar. The respondent is James Logan Helm, Administrator of the Estate of Larry Helm, who was substituted after Larry Helm died of causes unrelated to this litigation.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner David Bunch respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above proceeding on April 10, 1989.

OPINION BELOW

The opinion of the Court of Appeals for the Sixth Circuit was not recommended for full-text publication. It is reprinted in the appendix hereto. (pp. 1a-26a).

JURISDICTION

The respondents' decedent, Larry Helm, filed suit under 42 U.S.C. § 1983 in the Western District of Kentucky, which resulted in a plaintiffs' verdict on February 7, 1985. The Trial Court denied petitioner's motions for new trial, JNOV, Amendment and remittur. (pp. 27a-36a).

On petitioner's appeal, the Sixth Circuit on March 8, 1989, filed its opinion affirming the jury verdict. A petition for rehearing was filed, but denied on April 10, 1989. 42 U.S.C. § 1983 (pp. 40a-41a).

The jurisdiction of this Court to review the decision of the Sixth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved in this petition are 42 U.S.C. § 1983 and 42 U.S.C. § 1988, as well as the Fifth and Seventh Amendments to the United States Constitution.

STATEMENT OF THE CASE

On December 29, 1980 Larry Helm, the original plaintiff in this case filed a Complaint alleging that David Bunch, a Kentucky State Trooper; Roger Pierce, a Russell County, Kentucky Deputy Sheriff; and James Dunbar, Russell County, Kentucky jailer had violated the Civil Rights of Helm during the course of an arrest and subsequent incarceration which occurred on December 31, 1979 and January 1, 1980. More specifically, Helm claimed that the three law enforcement officers assaulted him, denied him the right to counsel and to medical treatment. Helm further alleged that the acts were malicious and wanton.

Bunch and the other two defendants admitted the arrest, the incarceration, and that Helm had sustained injuries during the course of his arrest but denied that the force used exceeded that which was necessary and further denied that any action on their part was malicious or wanton.

Trial was held on January 30, 31, February 5, 6, and 7, 1985. Then, during Voir Dire, the Trial Court, at the request of petitioner Bunch's counsel, asked the jury if they had any unfavorable experiences with law enforcement officers that would preclude them rendering a fair and impartial Verdict. One juror, who became Foreman, mentioned that he had a problem with a Conservation Officer but did not think that problem would preclude him from being fair and impartial. However, according to an affidavit subsequently filed by a fellow juror, the foreman had failed to disclose that he had some feelings regarding a speeding ticket that a Kentucky State Trooper had given his son or to divulge the extent of his feeling regarding the Conservation Officer matter.

In the late evening of December 31, 1979, Larry "Doodle" Helm was arrested by petitioner State Trooper David Bunch, in Russell County, Kentucky on charges of driving under the influence of alcohol. Trooper Bunch had stopped Helm after intercepting a radio transmission

from the Jamestown City Police Department indicating that an officer was in pursuit of Helm's automobile. In the car with Helm was a young man who was described as being drunk.

While Helm was being processed, he struck petitioner Bunch, who then hit Helm in the mouth once with his fist. Bunch acknowledged that his blow to Helm knocked out a tooth. Helm claimed that the blow knocked out two teeth and broke a third. Helm was administered a breathalyzer test at the jail, which resulted in a reading of .17. The legal reading for a person to be charged with drunk driving in Kentucky is .10.

After administering the breathalyzer examination Helm was placed in a holding cell. However, Helm began screaming, hollering and kicking the cell door with his boots. At the request of the jailer, Pierce and Bunch went back to the cell and pulled off Helm's boots.

Helm claimed that he was hit in the mouth by Bunch and struck with a hard object by Pierce while he was being processed at the jail in Jamestown. Helm claimed that one of the in-

juries to his head was where another officer at another time had "busted it open before". During the defendants proof, Kentucky State Trooper Michael Douglas Burton testified that he had arrested Helm in 1977 and that during the course of that arrest, he had struck Helm with his flashlight causing the injury that Helm claimed was inflicted by Pierce. That injury came about after Trooper Burton had arrested Helm's wife, her two sisters and another man. Helm came to the jail to see about his wife and, along with his wife and her two sisters, jumped Trooper Burton. Burton said he had to strike Helm with his flashlight causing an injury from Helm's forehead to his hairline. Burton's description of the 1977 injury corresponded with the injury claimed by Helm in 1980.

According to the defendants proof, Ronald Copley, another Deputy Sheriff not named in the lawsuit, assisted in the booking process of Helm. Copley said that he, not Pierce, had hit Helm after he had been jumped by Helm.

Helm claimed, in addition to his injuries, that he was denied the right to call his attorney at the time of his arrest and denied medical attention after he was struck.

Helm did not present any medical evidence or testimony, either directly or by deposition, except his own description of his injuries and symptoms. Some of that testimony was at considerable variance. For example, in his deposition, eighteen months after his arrest, Helm said he was hit on the back of the head, requiring no stitches and that he did not ask for medical treatment while at the jail.

Helm sought to prove the cut to his forehead through the testimony of his DUI Attorney Robert Wilson. However, under cross examination, Wilson acknowledged that he knew Helm had a previous injury to his forehead and acknowledged that, because of the five year lapse of time, his memory of which occasion he was recalling might be in error.

After the case was submitted, the jury sent three questions to the Court regarding

attorneys fees and expenses. Over the objections of defendants the Judge answered the questions rather than advise the jury that he had already instructed them on the issues they were required to decide. The jury returned a verdict in favor of Helm in the total amount of $30,000.00.

After the trial, the defendants learned from one of the jurors that the Foreman had not been candid in his voir dire answers regarding his feelings about law enforcement officers, and her affidavit was submitted with the Motion for Judgment NOV and New Trial. (pp.27a-36a). On the basis of the affidavit of the juror, the Court Ordered an evidentiary hearing but subsequently cancelled it after learning of this Court's decision in Tanner v. United States, 483 U.S. ,97 L Ed2d, 90, 107 SCt 2739 (1987).

Judgment in this case had been entered on February 25, 1985. The Court, by Memorandum Order dated December 23, 1987, overruled the defendants' Motion for Judgments NOV and New Trial. (pp. 71a-74a). It is from the Judgment

and denial of these Motions that petitioner Bunch appealed to the Sixth Circuit.

REASONS FOR GRANTING THE WRIT

I.

The District Court Judge violated the fair trial and due process aspects of the Constitution of the United States of America when he responded to three questions, posed by the jury after it began deliberations, all three of which were beyond the scope of the jurys' instructions or responsibility.

During the afternoon of the second day of deliberations, the Trial Court was notified that the jury had a question. In fact they had three questions. (p.42a). Those questions were:

Regarding sum of award (III)

a. What percentage of award, if any, will be received by the lawyer?

b. What percentage of award, if any, will be received by the plaintiff?

c. What will attorney's expenses be in addition to his fee?

S/Louis Gouvas
2/7/85 C80-0151

The petitioner's counsel initially moved for a mistrial which was denied by the Court. Thereafter, considerable discussion occurred between counsel and the Court on the best way to treat the situation. Helm's counsel wanted the jury told that the Court could award attorneys' fees and costs to the successful litigant, and taxed against the unsuccessful party, and any such award precluded the successful attorney from further charging his client additional compensation. (pp. 43a-45a). Petitioner Bunch's counsel objected on the grounds that " . . . it's obvious they are getting into extraneous matters, getting outside the scope and purview of the instructions." (p.45a). Despite the objections, the Court advised the jury as follows:

> Now, I probably can answer these better in one statement rather than one at a time, But essentially, in a civil rights case, as this type, the victorious or the winning side may recover as costs in the case a fair and reasonable attorney's fee plus expenses. But that's directed to the att-

> ention of the Judge of the Court after the trial. Whichever side wins may request that the Court award attorneys' fees and expenses to be paid by losing side to the attorney on the other side or the party, if the party, runs up these expenses. So any award that you make, if any, will all be received by the Plaintiff. (pp.50a).

As counsel for Pierce and Dunbar, the other two defendants, pointed out, the Judges' statement made the jury aware that a verdict for the law enforcement officers might subject the Plaintiff to the expense of having to pay defense attorneys' fees and costs. (pp.51a-53a).

During the discussions with counsel the Court observed that his choices were to tell the jury that he could not answer the questions or/to answer them according to Helm's counsel's suggestions.(pp.46a-47a). Moreover, the Court correctly observed that he could not answer such a question in a personal injury case. (p. 48a).

Petitioner Bunch submits that the Trial Court's decision to answer the jury questions

about the fees and costs was critically prejudicial to him and the other defendants.

The function of the jury in a 42 U.S.C § 1983 Civil Rights case is to determine if a person or persons acting under color of law subjected another person or other persons to deprivation of rights, privileges or immunities that are secured by the Constitution. If they so find, the jury can award appropriate damages. That award is based upon evidence of the violation and the jury's feelings about the value of punishment for that violation. Attorney's fees and costs are not part of the proof that is submitted to the jury for their consideration and deliberation.

As a matter of fact, attorney's fees are covered by a completely different statute. Moreover, that statute does not make attorney's fees mandatory in civil rights actions. Congress provided that " . . . the Court, in its discretion, may allow the prevailing party, other than the United States,a reasonable att-

orney's fee as part of the costs." 42 U.S.C. § 1988.

The consequence of the Trial Court's answer to the jury was to inject a factor into the jury deliberations which was completely outside the jury's scope and function. The jury was sworn to determine if any civil rights violations had occurred, and if so at the hands of whom, and then determine an economic value for the violation(s). The Trial Judge's answer was anything but harmless. The answer was also misleading, and possibly suggestive to the jury. It is true that the Judge explained that the prevailing party may recover costs, fair and reasonable attorney's fees and expenses. To that point, the Judge essentially recited the law as contained in 42 U.S.C. § 1988. However, the Trial Judge went a substantially damaging step further by stating " . . . as any award that you make, if any, will all be received by the plaintiff." (p. 50a). The "if any" qualification hardly lessens the directed verdict aspect of the Judge's answer.

The Sixth Circuit observed that

> . . .While it may have been wiser for the district court to not answer the jury's question, the fact that their question indicated that they were already figuring attorney's fees into their damages calculus provides support for the district court's action, since he was attempting to give them a clear understanding of their function at the damages stage. This fact also weakens appellants' prejudice argument.
>
> Given the nature of the questions and the discretion of the trial court, we do not believe the district court erred in answering the jury's question. (pp.11a-12a).

The Petitioner sumbits that only the jury could make that observation, at the time they asked the questions. The questions do have an implication which the Sixth Circuit adopted. But, it is not far fetched to also ponder whether only one or two jurors wanted answers to those questions, and insisted that they be submitted to the Trial Judge. Juror Meredith's affidavit indicates that she was certainly confused about the deliberation proceedings. (pp. 37a-39a).

It is one thing for a jury to debate amongst itself about facts and factors involved

in the case they are charged to decide. It is quite another for the Trial Court to add to the complexity of the decision making process by answering questions with information that was beyond the scope of the jury's purpose.

The Fifth and Seventh Amendments to the Constitution of the United States protect litigants in Federal Courts from being deprived of property without due process of law. It is not due process of law when a jury is provided with data, by the Trial court, that substantially affects or impinges upon the facts that they are deliberating upon. The statement or answer of the Court to the jury's three questions really amounted to new or additional evidence - and it came from the most respected person participating in the trial!

II

The District Court Judge should have held an evidentiary hearing on the issue of the jury foreman's biasafter receiving an affidavit

from a fellow juror, after verdict, that indicated the jury foreman did not give accurate or responsive answers during voir dire.

During voir dire, the Trial judge, at the request of the petitioner's counsel, questioned the jury panel about any bias they might have regarding law enforcement officers and State Police in particular. (pp. 53a-65a). The Judge suggested that the jurors exclude considering any experience they had concerning a traffic ticket. (p. 64a). Juror Louis Gouvas, who later became Foreman of the trial jury, mentioned that he was " . . . having a little bit of a problem with a Conservation Officer . . . ", but did not think that fact would keep him " . . . from being fair and impartial in this particular kind of case." (p. 64a). Juror Gouvas did not mention any other problems or concerns he had about law enforcement officers to the Judge during the voir dire.

However, Juror Gouvas apparently withheld some strong feelings that he had regarding a

ticket given to his son. According to an Affidavit of a fellow juror, Ruth Meredith, filed by the defendants' attorneys for a new trial, Juror Gouvas told the other jurors " . . .that he had a son who had (according to him) been wrongfully ticketed by the State Police for speeding" as well as mentioning more detail "at length" about the problems with the Conservation Officer. Juror Meredith stated that Gouvas "acted more as an advocate than as a fair and impartial juror." (pp. 37a - 39a).

Based upon the Affidavit of Ruth Meredith the Trial Court ordered a post-trial Hearing be scheduled regarding Juror Gouvas alleged withholding of information during voir dire. (pp. 66a -70a). The Hearing was cancelled upon the Trial Judge's learning of this Court's decision in Tanner v. United States 483 U.S. , 97 L Ed2d 90, 107, SCt 2739, (1987). The Judge stated that he was not sure that the juror's failure to respond to or elaborate on a voir dire question was juror misconduct, but even if it was, the Judge felt Tanner precluded

a post verdict evidentiary hearing.(pp. 71-74a).

Petitioner urges that Tanner is not dispositive of this issue at all. Tanner did not decide any issue about whether a juror told the truth about his or her biases during a voir dire examination. The majority in Tanner discussed, at length, that the law has recognized distinctions between external influences upon jurors and internal influences. 97 L Ed2d 104-106. Tanner involved what this Court categorized as internal influences. Petitioner Bunch submits that Juror Gouvas' critical comments about law enforcement officers during breaks represents extraneous or external influences and fall well outside the scope of the Tanner decision.

If Juror Meredith is correct about the statements of Foreman Gouvas, then he was not candid or truthful about his feelings toward law enforcement officers during his voir dire examination by the Trial Judge. If Gouvas' voir dire answers were like his attitude as described by Juror Meredith, then the peti-

tioner would have had a better opportunity to decide about challenging him. In fact, a challenge for cause might have been in order.

Mr. Gouvas' comments apparently occurred during various recesses and not during any deliberations. Consequently, a hearing regarding this issue should not be precluded by FRE 606 (b).

The protections afforded by the Fifth and Seventh Amendments to the United States Constitution should apply very specifically to this issue. Petitioner Bunch is entitled to have his property protected by a full and fair trial. A fair trial includes a fair and impartial jury. It is submitted that there is a very serious question before the Court regarding the fairness of a juror who obviously displayed a leadership role, since he was chosen as Foreman. The previously scheduled Hearing should have been held to determine whether Juror Gouvas was in fact biased against law enforcement officers and failed to divulge that attitude to the court during the voir dire process.

It is difficult enough to select a jury when they respond accurately and candidly to the voir dire questions posed by the Trial Court or counsel. However, when they knowingly fail to respond regarding a bias, then the party or parties against whom the bias is directed is prejudiced before any evidence is ever presented if that juror is selected. Juror Gouvas was selected, and if Ms. Meredith's affidavit is true, then Juror Gouvas was not only biased regarding his own vote, he communicated that bias to the other members of the panel during various recesses. If voir dire and the jury selection process is to be meaningful in a trial at all, then our Courts have to take a strong position when occurrances like this one come to its attention. Litigants are not guaranteed a perfect jury but the Constitution does guarantee that fair and impartial juries may be arrived at through a specified trial procedure of pointed questions and honest answers. When that procedure is knowingly violated then the trial stucture fails the litigants.

Ms. Meredith's Affidavit raises the most serious of allegations, that if true, indicate that a fair trial for the petitioner and the other two defendants may have been doomed from the beginning of trial, if Juror Gouvas was seated. If the information in the Affidavit is true, then Gouvas' expressed feelings to the panel are not simple afterthought. If the information in the Affidavit is true, then Gouvas was dishonest in his voir dire responses. The law should protect litigants in such occurrances, and petitioner Bunch believes that it does. Petitioner believes that the Hearing that the Trial Court scheduled on this issue should have been held to determine the facts regarding the ticketing of Gouvas' son, his problem with the Conservation Officer and the extent to which he may have influenced other jurors to the prejudice of the trial defendants.

CONCLUSION

Based upon the issues presented, the petitioner David Bunch believes that substan-

tial error has occurred in this case which prejudiced his right to a fair trial by an impartial jury. The Fifth and Seventh Amendments to the Constitution of the United States of America were enacted to protect litigants by insuring due process and fair juries. Unfortunately some of the issues presented to this Court indicate that some members of the jury in this case were not fair in their responsibility to the litigants, more particularly the petitioner. While litigants are not guaranteed a perfect trial, they are guaranteed a fair one. It is submitted that the petitioner David Bunch and the other defendants did not receive a fair trial.

Petitioner David Bunch, for the reasons set forth herein, believes that this petition for certiorari should be granted.

Respectfully submitted,

JOSEPH G. GLASS
235 South 5th Street
Louisville, Kentucky 40202
(502) 584-7288
Counsel for Petitioner

APPENDIX

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No. 88-5120

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JAMES LOGAN HELM, Administrator of the Estate of Larry Helm, (formerly Larry Helm), Plaintiff-Appellee, vs. DAVID BUNCH, ROGER PIERCE, JAMES B. DUNBAR, Jailer, Defendants-Appellants	ON APPEAL FROM THE UNITED STATES COURT FOR THE WESTERN DISTRICT OF KENTUCKY

Before: MILBURN and BOGGS, Circuit Judges; and CONTIE, Senior Circuit Judge.

PER CURIAM. Defendants Kentucky State Policeman David Bunch and Russell County Deputy Sheriff Roger Pierce, appeal from the district court's denial of their motions for judgment notwithstanding the verdict, a new trial, to alter, amend and vacate judgment and remittitur in this civil rights action brought pursuantto 42 U.S.C. §1983. For the following reasons, we affirm the judgment of the district court.

I

This case arose out of an incident involving the appellants and Larry Helm[1] which occurred on New Years Eve 1979. On that date, Larry Helm was arrested by appellants Bunch and Pierce on charges of driving while intoxicated.[2] At the jailhouse an altercation occurred. Helm received a gash on his forehead and had two teeth knocked out. He alleged that he sought medical treatment from James Dunbar, the county jailer, and asked to see an attorney, but both requests were denied.

On December 19, 1980, Helm filed his compliant, alleging that the appellants had vio-

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1. Larry Helm is deceased and this action is now being pursued by appellee James Logan Helm, the administrator of his estate.

2. A breathalyzer test was performed on Helm at the jailhouse. His blood alcohol content was .17%. To be charged with driving under the influence, a reading of at least .10% is needed.

lated his constitutional rights. The cause was tried to a jury in late January and early February of 1985. Before trial, the district court ordered the parties to exchange witness lists. The court also granted a motion in limine limiting evidence of Helm's resisting arrest to acts related to the occurrence at issue here. The appellants wished to enter evidence of Helm's previous acts of violent resisting arrest.

At voir dire, the judge asked the prospective jurors the following question: "Have any of you ever had any past experience that was in some way distasteful or unfavorable to you in which you had an experience with a law enforcement officer of any kind, besides getting a ticket? I suppose several of you have had those. I have too." In response to this question, Juror Louis Gouvas told of a problem he had with a conservation officer but indicated that the problem would not keep him from being fair or impartial.

At trial, Helm testified about his medical problems resulting from the jailhouse incident. He also presented the testimony of his DUI attorney Robert Wilson who testified that he saw Helm upon his release from jail and that he had a cut on his head. Wilson was not on the pretrial witness list presented by Helm. Helm's counsel claimed at a bench conference that appellants would deny that Helm was wounded and that Wilson's testimony was necessary to show that Helm had a wound when he left jail.

At the close of the evidence, interrogatories were submitted to the jury. The interrogatories read in pertinent part as follows:

> I. UNREASONABLE FORCE
>
> (a) Did the plaintiff, Larry Helm, suffer a deprivation of his liberty without due process of law, by reason of the acts and conduct of Trooper David Bunch or Deputy Sheriff Roger Pierce in the breathalyzer room at the jail?
>
> ANSWER: YES____ NO_____
>
> (b) If your answer to (a) is "yes", then which of those defendants deprived him of this liberty?

TROOPER BUNCH ____

DEPUTY SHERIFF PIERCE ____

BOTH ____

* * * *

(b) Were the injuries inflicted upon the plaintiff by the defendants in a malicious, wanton or oppressive manner?

ANSWER: YES ____ NO____

(IF YOUR ANSWER TO QUESTION (b) IS "NO," THEN SKIP QUESTION (c). HOWEVER, IF YOUR ANSWER TO QUESTION (b) IS "YES," THEN ANSWER QUESTION (c).)

(c) If your answer to Question (b) is "yes," then what sum of money do you award the plaintiff as punitive damages against the defendants? $_____.

While deliberating, the jury sent the following questions to the court:

Regarding the sum of award (III)

a. What percentage of award, if any, will be received by the lawyer?

b. What percentage of award, if any, will be received by the Plaintiff?

c. Will the attorney's expenses be in addition to his fee?

S/Louis Gouvas
2/7/85 C80-0151

The appellants moved for a mistrial on the ground that the jury was considering extraneous

matters. The court denied this motion and gave the jury the following answer to its questions:

> Now, I probably can answer these better in one statement rather than one at a time, But essentially, in a civil rights case, as this type, the victorious or the winning side may recover as costs in the case a fair and reasonable attorney's fee plus expenses. But that's directed to the attention of the Judge of the Court after the trial. Whichever, side wins may request that the Court award attorneys' fees and expenses to be paid by losing side to the attorney on the other side or the party, if the party runs up these expenses. So any award that you make, if any, will all be received by the plaintiff.

The jury returned a special verdict in favor of Helm and awarded him $14,000 from Bunch and Pierce jointly and severally for deprivation of liberty without due process of law, $7,000 from Dunbar for denial of his right to counsel and medical care, and $9,000 from all defencants jointly and severally as punitive damages.

The appellants filed a motion for NOV or a new trial or to alter the judgment or for remittitur alleging inter alia that they were denied their right to a trial by six jurors,

because one of the jurors, Agnes Walker, demonstrated that she could not hear the evidence and because another juror, Louis Gouvas, failed to disclose that his son had been given a disputed speeding ticket by the Kentucky State Police.

The motion was supported by the affidavits of Ruth Meredith, a juror, and Eddie Lovelace, the attorney for David Bunch. In her affidavit Meredith made the following assertion concerning juror Gouvas:

> I was one of the jurors who served in above action. Juror Gouvas discussed with us at one of the breaks that he had a son who had (according to him) been wrongfully ticketed by the State Police for speeding. He also discussed at length the problems that a family member had with a conservation officer and that they were going to attempt to get that case re-opened. Juror Gouvas argued long and hard for plaintiff, Helm. He acted more as an advocate than as a fair and impartial juror.

Lovelace made the following assertion concerning juror Walker:

> At the conclusion of the evidence, counsel for defendants requested that the jury be polled. The Court asked Juror Walker if the verdict was her verdict in a voice, aided by the microphone system, that was loud and clear enough to be heard all

> over the Courtroom. Juror Walker gave no response. At that time, the Court raised its voice and again inquired of Juror Walker. Again, Juror Walker made no verbal or other sign that she had heard the Court. Finally, the juror seated next to Juror Walker cupped her hands and asked Juror Walker, by speaking through her cupped hands directly into the left ear of Mrs. Walker, if that was her verdict. Finally, Juror Walker responded.

Helm responded to appellants' motions and presented the affidavit of juror Walker who asserted that "she heard all of the testimony in the case and all the other proceedings that took place in the trial."

The district court found no merit in appellants' arguments with the exception of their argument concerning the two jurors. After briefing, the court ordered a hearing concerning Gouvas' alleged withholding of information and found that juror Walker was competent to serve on the jury. The hearing was never held, however, for on December 23, 1987, the court denied the motion for a new trial based on juror misconduct. The court relied on Tanner v. United States, 107 S. Ct.2739 (1987).

Appellants timely appealed. Appellant Bunch and Pierce filed separate briefs. Bunch argues that the court erred in (a) answering the jury's questions concerning attorney's fees, (b) its interrogatory concerning punitive damages which did not allow for a determination of punitive damages on an individual basis for each defendant, (c) failing to hold an evidentiary hearing concerning jurors Gouvas and Walker, (d) allowing Wilson to testify when his name was not on the witness list, and (e) that Meredith's affidavit showed juror misconduct in arriving at their verdict. Pierce raises the arguments concerning the two jurors and the punitive damages interrogatory and also argues that the court erred in (f) excluding evidence of prior acts of misconduct by appellee, and (g) allowing appellee to testify concerning his medical problems as a result of his injuries.

II.

A.

Appellant Bunch argues that his due process rights and his right to a jury trial were violated when the district court provided the jury with information concerning the awarding of attorney's fees in civil rights actions.[3] Specifically, he argues that the district court erroneously interjected a factor into the jury's deliberations which was outside the scope of their function.

Appellee argues that the decision to answer the jury's question was within the discretion of the district court and that the fact the jury asked the question showed that the issue had already been interjected into their deliberations. Finally, he asserts that the court's instruction acted in the appellant's favor, because it preempted the jury from "hiking up" the award to cover attorney's fee.

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3. Appellant does not argue that the court's answer to the jury's question was inaccurate.

Initially, we note the general rule that

> the court may, at the request of the jury, give them further instructions after they have retired to deliberate, since the interests of justice require that the jury have full understanding of the case, and the court may, without the consent of counsel, recall the jury and give additional instructions although but one juryman requests them.

89 C.J.S. Trial §477 (1955) (footnotes omitted).

The basis of appellant's argument is that telling the jury that attorney's fees would be awarded to the prevailing party would make them less inclined to find for the defendants because they knew that such a finding would make the plaintiff liable for attorney's fees and costs.

Under the general rule, the court has discretion to answer the questions of the jury to give the jury a "full understanding of the case." While it may have been wiser for the district court to not answer the jury's question, the fact that their question indicated that they were already figuring attorney's fees into their damages calculus provides support for the district court's action, since he was attempting to give them a clear understand-

ing of their function at the damages stage. This fact also weakens appellant's prejudice argument.

Given the nature of the questions and the discretion of the trial court, we do not believe the district court erred in answering the jury's questions.

B.

Both appellants argue that the court committed plain error in submitting interrogatory II (b) and (c) to the jury, since the wording of the interrogatory did not allow for an individualized assessment of punitive damages.[4]

> In exceptional circumstances, . . . appellate courts, in the public interest may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings.

4. The appellants argue plain error because they did not object to the form of the interrogatories before their submission to the jury. See Fed. R. Civ. P. 51. Rodgers v. Fisher Body Div., General Motors, 739 F.2d 1102, 1106 (6th Cir. 1984), cert. denied, 473 U.S. 1054 (1985).

Rodgers v. Fisher Body Div., General Motors, 739 F.2d 1102, 1106 (6th Cir. 1984) (quoting United States v. Atkinson, 297 U.S. 157 (1936)), cert. denied, 470 U.S. 1054 (1985). Plain error is defined as an egregious error, one that leads to a miscarriage of justice. United States v. Busacca, 863 F.2d 433, 435 (6th Cir. 1988) (quoting United States v. Young, 470 U,S. 1, 15-16 (1985)).

Appellants argue that the interrogatory concerning punitive damages should have been styled like the interrogatory for compensatory damages, which allowed for an individual assessment of liability. They hypothesize that the jury may have awarded damages against less than all of the defendants if they were presented with the other style of interrogatory.[5]

5. The appellants do not argue that the court's interrogatory led to a shockingly large verdict thus distinguishing this case from Rodgers where the error in question was "obvious and it affected the fairness and integrity of the judicial process in that it was undoubtedly to some degree responsible for a shockingly large verdict." Rodgers, 739 F.2d at 1106.

The premise behind the appellants' argument is faulty. They presume that the jury might have believed that less than all of them acted maliciously thereby warranting punitive damages. This premise is defeated by the interrogatory itself which asked the jury if the defendants acted in a malicious manner. To answer this question in the affirmative, as the jury did, it must have found that all of the defendants acted maliciously. Therefore, the appellants were not prejudiced in the way that they assert. Rather, the only prejudice they may have suffered was that they must determine how to apportion the damages among themselves. We agree with the appellee that the use of this interrogatory did not amount to a miscarriage of justice.

C.

Appellants argue that the district court erred in not granting a new trial due to juror misconduct and bias. They base this argument

on Juror Gouvas' concealment of his displeasure over a traffic ticket issued to his son and the fact that juror Meredith stated that Gouvas acted like an advocate during deliberations. The district court denied the motion for a new trial finding alternatively that the allegations against Gouvas did not amount to juror misconduct and that even if they did, an inquiry into the matter was precluded by Tanner v. United States, 107 S Ct. 2739 (1987).

In Tanner, the Supreme Court considered the admissibility of juror testimony concerning alcohol and drug abuse by jurors. In determining, under the facts of the case, that such testimony was inadmissible, the court considered Federal Rule of Evidence 606 (b), which reads as follows:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question

> whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precludedfrom testifying be received for these purposes.

Fed. R. Evid. 606 (b) (emphasis added).

"Federal Rule of Evidence 606 (b) is grounded in the common-law rule against admission of jury testimony to impeach a verdict and the exception for juror testimony relating to extraeous influences." Tanner, 107 S Ct. at 2748. In Tanner, the Court noted the policy behind the rule.

> There is little doubt that post-verdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior. It is not at all clear, however, that the jury system could survive such efforts to perfect it. Allegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict seriously disrupt the finality of the process. Moreover, full and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople would all be

> undermined by a barrage of post verdict scrutiny of juror conduct.

Tanner, 107 S. Ct at 2747-49 (citations omitted). This circuit has also elaborated on the purposes behind the rule. "The rule ensures that jurors will not feel constrained in their deliberations for fear of later scrutiny by others. Further, it guarantees that jurors cannot manipulate the system when their views are in the minority by repudiating an earlier verdict and obtaining a mistrial." In Re Beverly Hills Fire Litigation, 695 F.2d 207, 213 (6th Cir. 1982) (footnote omitted), cert. denied, 461 U.S. 929 (1983).

In the instant case, under Rule 606 (b), the only way Juror Meredith's testimony would be admissible would be if it related to extraneous prejudicial information. Meredith's assertions concerning Gouvas' behavior in the jury room, i.e. "He acted more as an advocate than as a fair and impartial juror", is clearly testimony concerning internal matters that is precluded by the rule.

Appellants also argue that Gouvas' statements concerning his experiences with the police are analagous to extraneous prejudicial influences.[6] This information was not extraneous material, but rather encompasses the experiences and attitudes of juror Gouvas that he brought with him to the jury room. To allow an inquiry into such matters would abrogate the rule. This principle was recognized by the Fifth Circuit in United States v. McKinney, 429 F.2d 1019, 1022-23 (5th Cir. 1970), cert. denied, 401 U.S. 922 (1971).

> All must recognize, of course, that a complete sanitizing of the jury room is impossible. We cannot expunge from jury deliberations the subjective opinions

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6. The appellants make much of the fact that these exchanges occurred during various recesses and not during deliberations. The Court noted in Tanner that the external/internal distinction is not based on whether the jury is in the jury room when the irregularity occurred. Tanner, 107 S. Ct. at 2746. It is clear, therefore, that the substance of the alleged extraneous matter not the setting where it is disclosed is determinative of the admissibility of testimony concerning the matter.

> of jurors, their attitudinal expositions, or their philosophies. These involve the very human elements that constitute one of the strenghts of our jury system, and we cannot and should not excommunicate them from jury deliberations.

Finally, appellants' assertion that Gouvas did not accurately answer the court's questions during voir dire because he did not tell the court of his son's traffic ticket is belied by the court's interrogatory to the jury, since the court expressly excluded traffic tickets from the distasteful or unfavorable experiences with the law about which it was inquiring to determine any bias.

Both appellants argue that the district court erred in not holding an evidentiary hearing to inquire into the competency of juror Agnes Walker who apparently has a hearing problem. The appellee presented the court with the affidavit of Walker below. Walker asserted that she heard all the testimony and proceedings at trial. Because of this, the court did not hold a hearing, stating that it could not find that she was incompetent to serve as a

juror. Given this affidavit, we do not believe the district court erred in its ruling concerning juror Walker. See also Tanner, 107 S. Ct. 2746 (noting that courts have wisely treated allegations of a juror's inability to hear or comprehend at trial as as internal matter).

Accordingly, we hold that the district court correctly denied appellants' motion for a new trial based on juror misconduct.

D.

Bunch argues that the district court erred in allowing the testimony of Wilson, whose name was not included on appellee's pretrial list of witnesses. The exchange of witnesses was mandated by a pretrial order entered on February 9, 1984. The order specified that "In the absence of good cause no witness will be permitted to testify . . . except upon compliance with the conditions of this order." The district court allowed Wilson to testify concerning the wound on Helm because Helm's

counsel asserted that he was surprised by appellants' denial that they saw the wound.

"The decision to modify or enforce a pretrial order is discretionary with the trial court and will not be disturbed on appeal absent an abuse of discretion." Newman v. A.E. Stanley Mfg. Co., 648 F.2d 330, 333 (5th Cir. Unit B 1981). Given the fact that the order allowed for the admission of evidence where the order was not complied with on a showing of good cause, and the fact that appellee made a showing of good cause, i.e., surprise for failing to include Wilson in his pretrial list of witnesses, we hold that the district court did not abuse its discretion in allowing Wilson to testify.

E.

Bunch asserts that a new trial should be granted because Juror Meredith's affidavit indicates juror misconduct in arriving at its verdict. Meredith claimed that the jury com-

promised on its verdict and that one juror divided up the questions so each one came out equal. Appellant's argument is meritless, since the Meredith affidavit represents testimony about internal matters which is clearly prohibited by Rule 606 (b). See Hyde v. United States, 225 U.S. 347, 383-84, (1912) (juror testimony concerning compromise verdict should not be received); McDonald v. Pless, 238 U.S. 264, 269 (1915) (applying Hyde rule to an allegations of a quotient verdict).

F.

Pierce argues that the district court erred in excluding evidence concerning appellee's prior contacts with police. The district court made the following ruling on this issue:

> I think really 404 has to be looked at. Of course, that has to do with character evidence generally, and it says evidence of a person's character or trait of character is not admissible to prove that he acted in conformity therewith. . . . However, the Court believes that the officers may testify as to, as to other instances, experiences they have had directly rather than by reputation or

> character as such. If they have had runins personally with Mr. Helm in the past, they may testify to that. I'm not going to allow at this time any testimony or any proof about other instances of Mr. Helm with other officers or reputation about his belligerence.

Decisions concerning the admissibility of evidence under rule 404 (b) rest in the sound discretion of the district court and will not be disturbed absent a showing of abuse of discretion. United States v. Cooper, 577 F.2d 1079, 1088 (6th Cir.), cert. denied, 439 U.S. 868 (1978). Other than a bare allegation that the failure to admit this evidence prevented the appellants from putting forth their case, which was based on a theory of self defense, the appellant does not demonstrate how the district court abused its discretion.

Upon review of the record, we do not believe the district court abused its discretion in limiting the introduction of bad acts evidence.

G.

Finally, appellant Pierce argues that the court erred in allowing appellee to testify concerning his dizziness resulting from his injuries. He argues that the introduction of appellee's testimony without corroborating medical evidence was prejudicial in the award of damages. He argues that the testimony should not have been admitted, or that a qualifying instruction should have been given to the jury. Appellant relies on DeBuyser v. Walden, 255 S.W.2d 616 (Ky. Ct. App. 1953) and asserts that the introduction of the evidence was prejudicial.

In DeBuyser, the court was faced with the issue of excessive damages. At trial, the plaintiff had complained of nervousness, loss of weight, soreness in his shoulder and back and a susceptibility to colds as a result of an accident. The court determined that without medical evidence connecting the symptoms to the accident, it could not assume that

the connection existed. Id. at 618. The court went on to rule that the jury's award was excessive. The court did not address the admissibility of the plaintiff's testimony.

Appellee distinguishes DeBuyer by noting that nervousness is not commonly associated with most physical injuries, while dizziness is commonly associated with a blow to the head. Appellee also points out that appellant did not object to the testimony nor did he offer any qualifying instruction. Finally, appellee notes that the appellants were able to introduce medical evidence which contradicted appellee's testimony.

Appellant's argument is without merit. Appellant is essentially arguing that the evidence should not have been admitted under rule 403. However, since no objections were made at trial, this court's review is limited to a search for plain error. The appellant's prejudice argument is based on the assertion that the jury may have given great weight to

Helm's testimony in awarding damages. This assertion is belied by the award itself, which was for $21,000 in compensatory damages. Furthermore, appellant was able to counter any damage caused by Helm's testimony by introducing his own medical evidence. Given the foregoing, we hold that the district court did not err in admitting the challenged testimony of appellee.

For the foregoing reasons, the judgment of the district court is AFFIRMED.

MANDATE ISSUES: March 29, 1989

COSTS TAXED: NONE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT BOWLING GREEN

CIVIL ACTION NO. C80-0151 BG(S)

LARRY HELM — PLAINTIFF

VS

DAVID BUNCH, ROGER PIERCE and
JAMES B. DUNBAR, JAILER — DEFENDANTS

* * * * * * * * *

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT; MOTION AND GROUNDS FOR A NEW TRIAL; MOTION TO ALTER, AMEND, AND VACATE; AND MOTION FOR REMITTUR

Comes now the Defendant, David Bunch, and for his Motion and Grounds for a New Trial, Motion for Judgment notwithstanding the Verdict, Motion for Remittur, and Motion to Alter, Amend, and Vacate judgment, more specifically moves the Court as follows:

1. To grant unto this defendant a Judgment notwithstanding the verdict of the jury which judgment should dismiss the complaint of the plaintiff filed in this action.

2. In the alternative, to grant unto this defendant a new trial in this action on the following grounds:

(a) This defendant was denied the right to have a trial by six jurors and a unanimous verdict of six jurors for the reason that one juror, namely, Juror Walker, demonstrated that she could not adequately hear the evidence in this case due to some type of hearing impairment which hearing impairment was not noticeable to the defendant until such time as the jury was polled at the conclusion of this trial.

(b) The verdict was a result of bias, prejudice or passion on the part of the jury.

(c) Juror Gouvas failed to disclose unto the Court on voir dire examination that he had a family member who had a speeding ticket written by the state police which speeding ticket was disputed by Mr. Gouvas and his family. This information would probably have resulted in Juror Gouvas being stricken from the jury panel had it been known to counsel for the Defendant, David Bunch.

(d) The Court permitted evidence of plaintiff's injuries consisting of blackout spells and other physical problems which Helm claimed to have resulted from injuries sustained at the hands of the respective defendants in this action. This evidence was inadmissible for the reason that there was no medical evidence to support any claimed causation between the injuries received and the injuries complained upon. Since this causation is not a matter within the knowledge of a layperson, same required expert testimony. None having been introduced, it was prejudicial error to admit this type of testimony into evidence because same prejudiced the defendant, David Bunch, both on liability and on damages.

(e) The ruling of the Court on a Motion in Limine made by the plaintiff in this case resulted in the Defendant, David Bunch, not being able to introduce evidence of previous acts of misconduct by the plaintiff and his reputation for violence and for resisting

arrest. The ruling on the Motion in Limine erroneously and unfairly prevented the Defendant, David Bunch, from receiving a fair trial. This evidence would have been admissible, not necessarily to show that the plaintiff acted in conformance with his reputation and past acts, but, instead, to prove the reasonableness of the acts of David Bunch and Roger Pierce in the breathalyzer room once the attack by Helm as made.

(f) The ruling of the Court that permitted Robert L. Wilson, a witness who had not been put on the witness list, to testify in this action constituted surprise to the Defendand, David Bunch, which surprise resulted in the Defendant, David Bunch, not being able to adequately and fully present his defense. This surprise was heighten by the fact that the plaintiff, Helm, had testified that the only medical attention he had sought and received following his discharge from the jail was that of a dentist. The plaintiff, Helm, had also

testified in his deposition that the only injuries he was claiming was to the back of the head and the removal of his teeth. Therefore, to allow not only the plaintiff to alter his testimony but to buttress that testimony with a witness whose name and substance of testimony had not been made available to the Defendant, David Bunch, constituted prejudicial error.

(g) There was insufficient credible evidence on which to sustain a finding by the jury in this case and the verdict of the jury was contrary to the weight of evidence presented in this action.

(h) Damages were excessive.

(i) The Defendant, David Bunch, was prejudiced by the instructions given by the Court in response to a question by the jury regarding attorney fees. At that time, a mistrial should have been granted to the Defendant, David Bunch.

(j) The combined effect of the instruction and interrogatories deprived the

Defendant, David Bunch, of a fair and impartial trial. Said interrogatory was couched in the terms of a deprivation of liberty which would infer to an average juror that a person being placed in jail constituted, for the purpose of those instructions, a deprivation of liberty. The prejudicial effect of this instruction is evident when one considers the affidavit of Juror Meredith, a copy of which is attached hereto and made a part hereof.

(k) The interrogatories, as they related to punitive damages, were prejudicially erroneous because they did not allow a decision to be made on each individual defendant. Interrogatory No. III (b) asked whether or not the injuries inflicted upon the plaintiff by the defendants were done in a malicious, wanton, or oppressive manner.

(l) The Defendant, David Bunch, is entitled to a new trial because the finding of the jury for punitive damages, without sufficient supporting evidence to justify such a finding, establishes that the verdict was a result

of bias, prejudice, passion or other improper influence.

(m) The judgment entered herein is contrary to the law and evidence of the case.

(n) The verdict was procured by prejudiced testimony of the Plaintiff, Helm, regarding the nature and extent of his claimed injuries.

(o) The interrogatories did not allow the jury to separately assess damages and this defendant was thereby prejudiced.

3. To grant unto the Defendant, David Bunch, a remittur in the amount of $29,999.00 on damages due to the excessive nature of damages.

4. To alter, amend, and vacate the judgment to the extent that said judgment awards punitive damages.

5. To alter, amend, and vacate the punitive damages and all damages, except for nominal damages against the Defendant, David Bunch.

6. To conduct such evidentary as may be

necessary on these issues if the Court deems the affidavits to be insufficient to make a determination.

WHEREFORE, Defendant, David Bunch, request a judgment notwithstanding the verdict and in the alternative that the Court grant him a new trial or further in the alternative that the Court grant a remittur on damages and/or alter, amend, and vacate the judgment as to all but nominal damages.

Defendant also requests oral argument and time to file a memorandum in support of these motions.

EDDIE C. LOVELACE
104 Cumberland Street
Albany, Kentucky 42602
ATTORNEY FOR DEFENDANT,
DAVID BUNCH

CERTIFICATE

I hereby certify that a true and correct copy of the foregoing Motions has this day been served upon the plaintiff by mailing a copy of

same to the Hon. Dan Taylor, Attorney at Law, 1319 South Second Street, Louisville, Kentucky 40208, and upon the Hon. Thomas E. Carroll, P.O. Box 607, Monticello, Kentucky 42633 on this _____ day of March, 1985.

EDDIE C. LOVELACE
ATTORNEY FOR DEFENDANT
DAVID BUNCH

ERRATA

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
BOWLING GREEN DIVISION

CIVIL ACTION NO. C 80-0151 BG

LARRY HELM — PLAINTIFF

VS.

DAVID BUNCH; ROGER PIERCE;
and JAMES B. DUNBAR — DEFENDANTS

* * * * * * * * *

AFFIDAVIT

I, Ruth Meredith, after being first duly sworn, state as follows:

I was one of the jurors who served in the above action. Juror Gouvas discussed with us at one of the breaks that he had a son who had (according to him) been wrongfully ticketed by the State Police for speeding. He also discussed at length the problems that a family member had with a conservation officer and that they were going to attempt to get that case reopened. Juror Gouvas argued long and hard for plaintiff, Helm. He acted more as an advocate than as a fair and impartial juror.

Myself and one other juror went along with the verdict, although we felt that Helm

should not recover anything. We held out for a long time and finally gave in because we felt we had to reach a verdict. Had I known that I could have "hung" the jury by voting my convictions, I would not have relinquished them. The long time of deliberation and the constant telling to me by the foreman that we had no other choice finally caused me to give in.

The verdict was arrived at by compromise after arriving at a total figure of Thirty Thousand ($30,000.00) Dollars. One juror divided up the questions so that each one came out equal. There was never a separate determination made of damages other than the one juror figuring it to where it came out equal.

I did not understand the interrogatories. The way question 1 was written made it almost impossible to answer "no" because the act of placing him in jail constituted a deprivation of his liberty. Even though I felt, and other jurors felt, that he was deprived of his liberty for a reasonable amount of time until he sobered up, the form did not appear to allow

that answer. Once that question was answered yes, there seemed to be no choice as to the rest of the answers.

I don't think that the jury as a whole understood the instructions, and I think that a verdict should not have been rendered for the plaintiff.

This 6 day of March, 1985.

S/Ruth Meredith

Subscribed and sworn to before me by Ruth Meredith, on this 6 day of March, 1985.

S/Notary Public
NOTARY PUBLIC, STATE AT LARGE

My Commission Expires: _____

No. 88-5120

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMESLOGAN HELM, ADMINISTRATOR OF THE ESTATE OF LARRY HELM (FORMERLY LARRY HELM), Plaintiff-Appellee, v. DAVID BUNCH, Defendant-Appellant	ORDER

BEFORE: MILBURN and BOGGS, Circuit Judges; and CONTIE, Senior Circuit Judge.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the

issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

S/Leonard Green
Leonard Green, Clerk

Regarding sum of award (III):

a. What percentage of award, if any, will be received by the lawyer?

b. What percentage of award, if any, will be received by the plaintiff?

c. Will the attorney's expenses be in addition to his fee?

S/Louis Gouvas

2/7/85 C 80-0151

opportunity to object to any instructions that the Court deems appropriate.

MR. TAYLOR: Could I request three minutes?

THE COURT: Sure.

MR. TAYLOR: Would you allow me to take that?

THE COURT: Yes.

MR. TAYLOR: We'll be right out here, Judge.

THE COURT: Fine. We'll let you all go and we'll get off the record again.

(A pause was had in the proceedings.)

MR. TAYLOR: Your Honor please, could I be back on the record?

THE COURT: Sure.

MR. TAYLOR: Your honor, having considered further our position, I would request that this Court respond to the note just received - this note will be retained in the record?

THE COURT: Yes, sir.

MR. TAYLOR: Yes, sir. At least from the

plaintiff's request, that this Court respond to that note as follows: That the Court has the power, should it deem proper, and upon proper application therefore, to award attorney's fees and legitimate costs to the successful party in the action, which is then taxed against the non-successful party, unseccessful party; that any attorney so awarded is prevented

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from, is precluded from receiving compensation both from the Court and from his client.

THE COURT: I don't know whether that's true.

MR. TAYLOR: That's true as an ethical thing.

THE COURT: It's what you have stated.

MR. TAYLOR: We had it before, and we do not double dip.

THE COURT: All right.

MR. TAYLOR: It's just not right.

THE COURT: Well? What if I tell them

that? What is your all's position? Or words to that effect. It may not be exactly. I think I understand what Mr. Taylor is saying. I think, I think what you have to do is either tell them that or you have to say that I can't tell you that, and then take your chances as to what, what they might speculate on, I suppose. They might think that out of a total award, Mr. Taylor gets his fee, that's how he gets his fee. Like many people are familiar with personal injury claims, they might decide it should be hiked up. Go ahead.

MR. LOVELACE: The very basis, of course, of my motion was, it's obvious they are getting into extraneous matters, getting outside the scope and purview of the instructions.

THE COURT: I understand. We really can't look behind it unless they are matters which outside influence has

come to bear on them.

MR. TAYLOR: Could I respectfully object

to my opponents in this lawsuit, that the response I'm suggesting probably will, there is something in contract law about minimizing the damages. I don't believe that it's prejudicial to you if you permit or don't object to His Honor instructing, or responding as I just requested. It seems to me that if judgment should go against you, it would be in a lesser amount. Other that that, they have to throw in something for the lawyer. I'm just-- I say that in aid of my hope.

MR. CARROLL: Unless--

MR. TAYLOR: You are winning?

MR. CARROLL: They don't want you to get anything.

MR. TAYLOR: How could anybody feel that way?

MR. CARROLL: Because you told them you didn't want anything.

THE COURT: They don't have any control over whether he getsnothing, of course. I don't know how to tell them that. I would

either have to tell them that I can't answer the question or have to answer them, I think, like Mr. Taylor says. I think that's the only two choices.

MR. TAYLOR: That puts me in a-- I hope you answer the way I did. I would like to take--

THE COURT: Really, I think it's to the benefit of the plaintiffs that-- I mean to the defendants that I answer

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them the way you suggest. I think it's to the benefit of all parties. But I'm willing to listen to any suggestions you might have.

MR. TAYLOR: As far as whose ox is getting gored in the whole exchange, I can feel the hot breath of the beast approaching me.

THE COURT: Do you all want to make any suggestions?

MR. LOVELACE: I think for the defendant Bunch, I would just stand on the motion that's been made and--

THE COURT: Mr. Carroll, do you want to say anything?

MR. CARROLL: Quite frankly, Your Honor, I don't know what to say.

THE COURT: I have never told a jury that attorney fees will be awarded to the victorious party. But since they have made that issue, I don't know but what it's better for them to understand, so they don't try to figure how much the lawyer is going to get out of this whole thing.

MR. TAYLOR: I agree with the Court.

THE COURT: If we had a personal injury case, I couldn't answer them, because that's really a matter between the client and the attorney.

MR. TAYLOR: This is a little different, though, isn't it?

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since they have made this question, why, we'll, we'll go, we'll let you bring the jury down and we'll open court back up and I'll answer the

questions in the way I have said, and after the jury goes back out you can make your objections again. If there are any additions to what I've said, let me know before the jury leaves. If you just want to object for the reasons you have stated, you can do that after the jury has gone.

MR. CARROLL: We'll still preserve our right to object to the instructions of the Court and list the reasons for the objections?

THE COURT: Sure.

(The chambers preceedings were concluded).

THE COURT: Let the record show all the parties and counsel and jurors are present.

Ladies and gentlemen, I have your questions here, and I'll attempt to answer these as best I can.

The question says, Regarding sum of award, number 3, what, A, What percentage of award if any will be received by the lawyer? B, What percentage of award if any will be received by the plaintiff? And C, Will the attorney's expenses be in addition to his fee?

Now, I probably can answer these better in one statement rather than one at a time. But, essentially, in a civil rights case, as this type, the victorious or the winning side

may recover as costs in the case a fair and reasonable attorney's fees plus expenses. But that's directed to the attention of the judge of the Court after the trial. Whichever side wins may request that the Court award attorney's fees and expenses to be paid by losing side to the attorney on the other side or the party, if the party runs up these expenses. So any award that you make, if any, will all be received by the plaintiff.

So I hope that that answers your questions, ladies and gentlemen. If you have additional questions, you may submit those to the Court.

Are there any additional answers that the parties would like the Court to make at

this time?

MR. TAYLOR: None, Your Honor.

THE COURT: All right.

MR. CARROLL: None, Your Honor.

MR. LOVELACE: None, Your Honor.

THE COURT: All right. You may retire to your jury room, ladies and gentlemen.

(The jury retired from the courtroom)..

THE COURT: We'll let this be placed in the record. You may go ahead. I'll take up the matter with the attorneys.

Is there anything else you would like to add on the record, since the jurors are gone?

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MR. CARROLL: Your Honor, we would like to place objections into the record, please the Court.

THE COURT: All right. Is there any specific reason besides what you previously made in chambers?

MR. LOVELACE: The objections basically

would be the same, as the question that the Court has commented upon goes beyond the scope and purview of the evidence, and therefore unduly prejudices the defendants in this action.

THE COURT: Okay. Mr. Carroll?

MR. CARROLL: Your Honor, the defendant Pierce and Dunbar would object for the reasons that Counsel Lovelace has stated. We would adopt those. And in addition thereto, I would point out to the Court that the jury is now aware that if we are successful that Mr. Helm may have to pay attorney fees, and therefore would make them, perhaps, reluctant to return a verdict in favor of our clients, because of the possibility it would subject Mr.Helm to paying our attorney fees. And if they are in a position where they decided they don't really want anybody to recover anything, a verdict in to your favor might actually be a verdict to the detriment of the plaintiff, or than not receiving anything, he may have to pay additional attorney fees and costs. And I think we have

been prejudiced thereby.

THE COURT: You want me to tell them, bring them back down and say if the defendants wins, the plaintiff may not

bar.

THE COURT: Okay.

MR. TAYLOR: I would request that they stay away from his past arrests and so forth, unless they are relevant to the case in some way. He has been arrested many times.

THE COURT: All right.

MR. CARROLL: Generally he resists arrest when he does.

THE COURT: You all plan on bringing out his past arrests?

MR. LOVELACE: Yes, sir.

MR. CARROLL: To the extent it shows his tendancy, proclivity and inclination of resisting arrest, which he has acknowledged he has that reputation.

MR. TAYLOR: If you do, I feel I would be entitled to show that every time he has been arrested he has been whipped.

THE COURT: Sure.

MR. TAYLOR: Okay. If they want to make that trade, I would be delighted.

THE COURT: Okay, with that understanding. Do you have any questions on voir dire?

MR. LOVELACE: One question I would like to have asked for the defendant Bunch is whether or not any member of the jury or their immediate family has filed any actions

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similar to this one against a member of the Kentucky State Police.

THE COURT: Okay. Against the Kentucky State Police. Okay.

MR. LOVELACE: Or law enforcement officials.

MR. CARROLL: Why don't you make law enforcement officials?

MR. LOVELACE: Yes. Also whether or not

they have any prejudice against law enforcement officials. People get tickets and so forth, and some of them get a little bit prejudiced as a result of that. That would be the only two questions I would ask.

THE COURT: Anything?

MR. CARROLL: I think that would be all.

THE COURT: Okay.

MR. CARROLL: I would prefer it not be termed prejudice. Have you had any unsatisfactory dealings.

THE COURT: Okay. Any bad dealings with the State Police.

MR. LOVELACE: Distaste or something.

MR. CARROLL: Prejudice I don't like to use.

THE COURT: Let me ask you all, what's your best estimate on time to complete this trial?

MR. TAYLOR: I'd say, in view of what my friend Eddie has said, that it will run today, it will run more

A JUROR: Well, we seen it on television last Thursday night. We were at Columbia at my husband's niece's, and she knew the jailer and I think my husband knew this man, and they were talking about it, you know.

THE COURT: Okay. I didn't know it came on TV.

A JUROR: It was on Channel 13 last Thursday.

THE COURT: All right. Based on what you learned about it there, do you think that you have formed an opinion as to whether the plaintiff here should recover damages or that his civil rights were violated? Did you form such an opinion?

A JUROR: Not really. I mean they were just joking about it. But I didn't pay no attention to it.

THE COURT: Do you think you could set aside anything you may have heard or seen and try the case solely on what you hear and see in this courtroom?

A JURCR: Yeah, I could.

THE COURT: Could you be fair and impartial as a juror?

A JUROR: Yes.

THE COURT: Thank you Mrs. Coomer. Anybody else?

(No response.)

THE COURT: Now, do any of you now or have you in the past even been employed as a law enforcement officer in

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any fashion with the state or city police or sheriff's department or federal officer of some sort? Anybody?

(No response.)

THE COURT: Do any of you have any close friends or relatives who are now or used to be employed in some law enforcement capacity as a police officer, sheriff's office? Yes, Ma'am.

A JUROR: I do. Nick Stevens, he is a state trooper.

THE COURT: Okay.

A JUROR: His wife works with me. And Billy Minton, he's a city police at Horse Cave. And his wife also works where I work.

THE COURT: Okay. What is you name, ma'am?

A JUROR: Sheila England.

THE COURT: Okay. Would the fact that you know these families of law enforcement officers in any way keep you from being fair and impartial in this particular trial?

A JUROR: No, sir, it wouldn't.

THE COURT: You would not tend to believe a law enforcement officer more than anybody else just because you might know someone?

A JUROR: No.

THE COURT: Thank you, Mrs. England. Yes, ma'am?

A JUROR: My husband was the sheriff in '84. Would that matter?

THE COURT: Yes, we would want to know about that. It wouldn't matter, but what is

your name?

A JUROR: Ruth Meredith.

THE COURT: Where was he sheriff?

THE JUROR: In Edmonson County.

THE COURT: All right. Would the fact that he was sheriff keep you from being a fair and impartial juror here?

A JUROR: No, sir.

THE COURT: Would you give the testimony of a - of a law enforcement officer any greater weight than you would anyone else solely because of the fact that he is a law enforcement officer?

A JUROR: No.

THE COURT: Thank you, ma'am. Anybody else? Yes, ma'am.

A JUROR: I'm Joyce St. Charles. My brother served as sheriff of Metcalfe County some fifteen, sixteen years ago, And my brother currently is with the State Police, Kentucky State Police in Frankfort.

THE COURT: And what's his job at the

State Police? Do you know?

A JUROR: He is with the department of

professional standards.

THE COURT: All right. What is your brother, who was it that was the sheriff?

A JUROR: Roy Smith in Metcalfe County.

THE COURT: Okay. And would the fact that these brothers of yours are or have been law enforcement officers keep you from being fair or impartial as a juror here,

A JUROR: I would certainly try for it not to be, but I must admit that having talked with them on various matters over the years, I would try not to be opinionated, in some circumstances I would be.

THE COURT: Well, if you think you would be in this kind of a case, I will excuse you. I will leave it up to you.

A JUROR: I think it might be better if I served on another case, if it's all right.

THE COURT: I will excuse you, Mrs. St. Charles. Thank you for being frank. You are excused now until further call. Thank you so much.

A JUROR: Thank you.

THE COURT: Anyone else? Yes, sir.

A JUROR: I have got a nephew who is a deputy sheriff, but not in this state.

THE COURT: What is your name again , sir?

A JUROR: Harold Turner.

THE COURT: All right. And what state is he a deputy sheriff in?

A JUROR: California.

THE COURT: Would the fact that he has been in such a position keep you from being fair or impartial if chosen as a juror here?

A JUROR: No, because I don't see him too often.

THE COURT: Would you give a law enforcement officer's testimony any greater weight than you would anyone else's solely because of

that reason.

A JUROR: No.

THE COURT: Thank you, Mr. Turner.

Anyone else?

(No response.)

THE COURT: All right. Is there any one of the rest of you who would give any greater weight to the testimony of a law enforcement officer and for no other reason?

(No response.)

THE COURT: Is there anyone here because of the nature of, of this case, that it's a civil rights case, and as I have told you what it's about, is there anyone here who feels that you could never award a judgment in favor of a person who claims his civil rights have been violated, just

because of the nature of the case?

(No response.)

THE COURT: And likewise, is there anyone who could never grant judgment in favor of a

person who has been sued for an alleged civil rights violation because you feel that such suit should be brought and you could always - you could never bring a verdict back in favor of an officer? Is there anyone who has that problem?

(No response.)

THE COURT: Is there anyone who could never find in favor of a person who has sued an officer, such as a State Police officer or a city police officer or a jailer? Is there anyone who could not bring back a judgment against a person like that if you felt the evidence supported such a judgment?

(No response.)

THE COURT: Likewise, is there anyone who could not award a verdict in favor of those officers if you felt the evidence supported it?

(No response.)

THE COURT: Are there any of you or members of your family who have ever filed a lawsuit against any law enforcement officer for any reason?

(No response.)

THE COURT: Have any of you ever had any past

experience that was in some way distasteful or unfavorable to you in which you had an experience with a law enforcement officer of any kind, besides getting a ticket? I suppose several of you have had those. I have too.

Yes, sir.

A JUROR: Louis Gouvas. I have been having a little bit of a problem with a conservation officer over in Butler County at the present time.

THE COURT: Okay. You are Mr. Gouvas? Is that right?

A JUROR: Yes, sir.

THE COURT: And would that fact in any way keep you from being a fair and impartial juror in this particular kind of a case?

A JUROR: No, I don't think so.

THE COURT: You feel you could bring back a verdict for either side, depending on what

you feel the evidence shows?

A JUROR: Yes, sir.

THE COURT: All right. Thank you, sir. Anybody else?

(No response.)

THE COURT: All right. Are there any additional questions either side would like the Court to ask?

(No response.)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
BOWLING GREEN

CIVIL ACTION NO. 80-0151BG(S)

LARRY HELM PLAINTIFF

VS: MEMORANDUM

DAVID BUNCH, ET AL DEFENDANT

This matter comes before the Court on Defendants' motion for a new trial. This case originated as a civil rights action instituted by Plaintiff against Defendants alleging that Defendants physically assaulted Plaintiff during and subsequent to his arrest for driving under the influence in Russell County, Kentucky. The trial of this case began on January 30, 1985. After the close of the evidence, the jury returned a verdict against Defendants awarding compensatory and punitive damages. Thereafter, Defendants moved for a new trial on basically two grounds: (1) Juror Gouvas deliberately failed to answer certain questions propounded to prospective jurors on voir dire examination; and (2) Juror Walker suffered from

a hearing impairment which should have disqualified her from serving on the jury. After having considered the record in this case, including the transcript of the voir dire of the jurors, the Court finds it is necessary to conduct a post-trial hearing concerning Juror Gouvas' alleged failure to answer certain voir dire questions.

DISCUSSION

A. Juror Gouvas

Defendants allege as grounds for their right to a new trial that their right to exercise their peremptory challenge was prejudicially impaired because Juror Gouvas failed to disclose on voir dire examination that his son had been issued a traffic ticket by a state policeman. In McCoy v. Goldston, 652 F.2d 654 (6th Cir. 1981), the Sixth Circuit Court of Appeals set forth two tests for determining whether Defendants have alleged facts which establish a prima facie case that their right to peremptory challenge was prejudicially impaired. First, a prejudicial impairment will be established if "a juror has intentionally

concealed or purposefully given incorrect answers" during voir dire. Id. at 658. Second, prejudicial impairment will be established if "the undisclosed information is indicative of probable bias concerning either a material aspect of litigation or its outcome." Id. at 659. If Defendants have presented a sufficient evidentiary basis to raise a factual issue of prejudice under the above-styled tests, then the "district court must conduct a formal inquiry into the juror's alleged withholding of information during voir dire." Id. at 658.

Defendants have submitted an affidavit by Juror Meredith which states that Juror Gouvas discussed with the jurors during one of breaks at trial that his son had been wrongfully ticketed by the state Police for speeding. Defendants argue basically that Juror Gouvas should have disclosed this fact to the Court in response to the following question on voir dire examination:

> Have any of you ever had any past experience that was in some way distasteful

or unfavorable to you in which you had an experience with a law enforcement officer of any kind, besides getting a ticket?

Due to the wording of the question which tended to exlude answers involving the unfavorable experience of receiving a ticket, the Court feels that Juror Gouvas did not intentionally conceal or purposefully give an incorrect answer to this question.

However, under the second test set forth in McCoy, the Court must find that Juror Gouvas' son's receipt of a traffic ticket issued by the State Police for speeding and which Juror Gouvas believes was wrongfully issued could be indicative of probable bias concerning either a material aspect of the litigation or its outcome. Thus, since Defendants have presented a sufficient evidentiary basis to raise a factual issue of prejudice under the second test set forth in McCoy, a post-trial hearing must be conducted concerning the juror's alleged withholding of information during voir dire.

B. Juror Walker

Defendants further allege as grounds for right to a new trial, that Juror Walker suffered from a hearing impairment which should have disqualified her from serving on the jury. Juror Walker has submitted an affidavit stating that she heard all the testimony and other proceedings at the trial. The only evidence Defendants have submitted on this point is affidavits of counsel for Defendants stating Juror Walker suffered from a hearing impairment during the trial. Without further proof that Juror Walker indeed suffered from a hearing impairment, since Juror Walker has indicated to the Court that she heard the testimony and other proceedings at trial, the Court cannot find that she was not competent to serve as a juror on the case. See United states v. Tegzes, 715 F.2d 505 (11th Cir. 1983).

This 24 day of August, 1987.

copies to
Taylor
Lovelace
Carroll

S/ Eugene E. Siler, Jr.
EUGENE E. SILER, JR.
Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
BOWLING GREEN

CIVIL ACTION NO. 80-0151 BG(S)

LARRY HELM, PLAINTIFF,

VS: MEMORNADUM

DAVID BUNCH, ET AL., DEFENDANTS.

This matter comes before the Court on Defendants' motion for a new trial. This case originated as a civil rights action instituted by Plaintiff against Defendants alleging that Defendants physically assaulted him during and subsequent to his arrest for driving under the influence in Russell County, Kentucky. The trial of this case began on January 30, 1985. After the close of the evidence, the jury returned a verdict against Defendants awarding compensatory and punitive damages. Thereafter, Defendants moved for a new trial on basically two grounds: 1) Juror Gouvas deliberately failed to answer certain questions propounded to prospective jurors on voir dire examination;

and 2) Juror Walker suffered from a hearing impairment which should have disqualified her from serving on the jury. Defendants' motion for a new trial will be denied, based on the record in this case and on the recent Supreme Court case of Tanner v. United States, ____U.S. _____, 49 U.S.L.W. 4942 (June 22, 1987).

In Tanner, the Supreme Court distinguished between "internal" influences, about which jurors cannot testify to impeach a verdict, and "external" influences about which jurors can testify. Noting the "(t)he distinction (is) not based on whether the juror was literally inside or outside the jury room when the alleged irregularity took place," id. at 4945, the Court listed as external influences: 1) reading prejudicial information not admitted to evidence, 2) hearing the bailiff's comments on defendant, 3) being offered a bribe, and 4) having a pending application for employment at the District Attorney's office. Id.

In Tanner the Court noted that "(c)ourts wisely have treated allegations of a juror's

inability to hear or comprehend at trial as an internal matter," id. at 4945. Thus Federal Rule of Evidence 606 (b) precludes an additional evidentiary hearing on Juror Walker's ability to hear. Therefore in accordance with this Court's Memorandum of August 24, 1987, Defendants motion for a new trial based on objections to Juror Walker will be denied.

In Tanner the Court stated that "(a)llegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict seriously disrupt the finality of the process." (Emphasis added.) Id. at 4946. This Court is not convinced that Juror Gouvas' comments during one of the breaks, or his failure to elaborate concerning his son's receipt of a speeding ticket in response to a voir dire question rises to the level of juror misconduct. However, even if they do constitute juror misconduct, Tanner precludes a post-verdict evidentiary hearing. Therefore this Court

confines its investigation to the trial transcript, and feels that Juror Gouvas did not intentionally conceal or purposefully give an incorrect answer to the voir dire question. Therefore, Defendants' motion for a new trial based on objections to Juror Gouvas will be denied.

This 23 day of December, 1987.

S/Eugene E. Siler, Jr.
EUGENE E. SILER, JR
Judge

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Carroll